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No. 93-1609

In The

Supreme Court of the United States

October Term, 1993

REV. JERRY McDONALD and
CALVARY BOYS RANCH,

Petitioners,

v.

OKLAHOMA DEPARTMENT OF HUMAN SERVICES
and BENJAMIN DEMPS, JR.
in his capacity as the Director,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents reject the Petitioners' characterization of the questions presented. The following questions regarding jurisdiction should be initially considered:

1. Whether Petitioners failed to present its current First Amendment claim under the Free Exercise Clause or Fourteenth Amendment due process analysis to the state court of last resort, the Oklahoma Supreme Court, thereby precluding jurisdiction under 28 U.S.C. § 1257(a)?

2. Whether the Petitioners asserted a claim under the Free Exercise Clause involving this state statute, 10 Okla. Stat. § 401, *et seq.* in a prior Petition to this Court, and, therefore, is precluded from rearguing such claim in this appeal?

PARTIES TO THE PROCEEDINGS

The Respondents named in the Petition should be modified by substitution of a successor official. Benjamin Demps, Jr. has been replaced by George Miller as Director of the Oklahoma Department of Human Services.

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BRIEF IN OPPOSITION

OPINIONS DELIVERED IN STATE COURTS BELOW

The opinions rendered by subordinate courts and cited by Petitioners are correct, and are contained in the Petitioners' Appendix. An additional Memorandum Opinion, however, dated June 20, 1989, by the Oklahoma Court of Appeals is relevant to jurisdiction over a constitutional claim. *State of Oklahoma ex rel. Don Roberts District Attorney v. Rev. Jerry McDonald, et al.*, 787 P.2d 466 (Okl.App. 1989) (*McDonald* I), involved Petitioners' previous unsuccessful challenge against the Oklahoma Child Care Facilities Licensing Act, 10 O.S. § 401, *et seq.*, as

violative of rights under the Free Exercise Clause of the First Amendment.

JURISDICTION

As discussed in detail in the following sections, petitioners have failed to present a Free Exercise Clause claim under the First Amendment or Fourteenth Amendment due process analysis regarding 10 Okla. Stat. § 401, *et seq.*, (hereinafter, the "Act") against licensure of petitioners' residential facility for children, to the state court of last resort. Thus, there is no final decision on those questions that is reviewable under 28 U.S.C. § 1207(a).

Petitioners previously sought a Writ of Certiorari before this Court in No. 89-1881 based upon the Free Exercise Clause and challenged the requirement of licensure under the above Statute. Following a dismissal of the appeal of *McDonald* I as untimely by the Oklahoma Supreme Court, this Court denied a Writ of Certiorari. *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990). Consequently, the doctrine of *res judicata* bars review of petitioners' First Amendment claim under any basis.

STATUTORY PROVISIONS

§ 401. Purpose and policy of law-Minimum standards

> (a) It is the declared purpose and policy of this act, same to be known as the "Oklahoma Child Care Facilities Licensing Act," to insure maintenance of minimum standards for the care

and protection of children away from their own homes, to encourage and assist the child care facility toward maximum standards, and to work for the development of sufficient and adequate services for child care through joint work of public and voluntary agencies. Whenever possible, child care facilities should help to preserve and restore family life for children.

(b) In order to provide care for children in child care facilities, a license shall be obtained from the Department of Public Welfare, which is issued on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such agencies and individuals.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case omits discussion of orders and pleadings relevant to the jurisdiction of this Court to hear the instant petition. Respondents, therefore, submit the following statement.

1. It is correct that an injunction was issued on September 22, 1987, under Section 409 of the Act (See Pet. App., at 17), against petitioners' operation of their 24 hour full-time residential facility for children formerly known as Calvary Boys Ranch. Petitioners had refused to apply for a license alleging that the mere act of licensure violated their rights under the Free Exercise Clause.

2. The injunction was upheld by the Oklahoma Court of Appeals in *McDonald* I, *supra*, and the Free Exercise Clause argument was rejected. Petitioners'

appeal of *McDonald* I to the Oklahoma Supreme Court was dismissed on February 21, 1990 as untimely (*See* No. 89-1881; Pet. App., at 9). As noted in the jurisdictional statement above, this Court denied review on November 18, 1990. *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990). The state court injunction, therefore, continued in full force and effect.

3. Following Christmas vacation, the residential facility reopened on January 4, 1991, under the name Calvary Christian Boarding Academy. Since petitioners again refused to apply for a license, the Oklahoma Department of Human Services notified Rev. Jerry McDonald that he was in violation of the injunction. Petitioners then filed a declaratory judgment action asking the trial court to determine their residential facility exempt from licensure as being "primarily educational" in purpose under 10 Okla. Stat. § 402(4) of the Act. Although rejected by the trial court, petitioners also claimed to be exempt under Section 403(a) of the Act as being supervised by the State Department of Education.

4. Although finding Section 402(4) vague, petitioners alleged right to an exemption from licensure based upon the Free Exercise Clause was rejected by the trial court (Pet. App., at p. 32, para. 12). However, the Free Exercise Clause argument was neither presented to, nor considered by, the Oklahoma Court of Appeals in *McDonald* II (Pet. App., at 19). Most importantly, neither the First Amendment Claim, nor the Fourteenth Amendment due process analysis was presented to the Oklahoma Supreme Court in petitioners' Amended Petition for Certiorari (Resp. App., at 1-5).

5. The Oklahoma Court of Appeals in *McDonald* II reversed the trial court holding that the "primarily educational" licensure exemption was vague and unenforceable. The appellate court held that the exemption language was clear and unambiguous, applied only to "part-time" care, and not a "full-time" residential facility such as the one operated by petitioners. The Oklahoma Court of Appeals explicitly found:

> " . . . the clear and unambiguous wording of § 402(4), as a matter of definition, does not include 'full time' child care facilities in the exemptions . . . even if that facility is primarily educational in purpose, . . . "

(Pet. App., at 23)

The appellate court further noted the expressed purpose of the state statute as set forth in 10 Okla. Stat. § 401:

> "(a) It is the *declared purpose* and policy of this act . . . *to insure* maintenance of *minimum standards for the care and protection of children away from their own homes* . . .
>
> (b) . . . a license shall be obtained from [DHS] on the basis of meeting minimum standards which are essential for the health and welfare of the child or children placed for care with such . . . individuals." (emphasis added)

The appellate court then held licensure of petitioners' facility consistent with the intent of the Statute. The Oklahoma Supreme Court denied a petition for writ of certiorari. Pet. App., at 18.

THE COURT SHOULD DENY THE PETITION

A. THIS COURT LACKS JURISDICTION TO REVIEW PETITIONERS' FIRST AMENDMENT CLAIM OR FOURTEENTH AMENDMENT DUE PROCESS CLAIM SINCE NEITHER WAS PRESENTED TO THE STATE COURT OF LAST RESORT.

Petitioners' attempt to seek review of the "primarily educational" exemption in Section 402(4) of the Act via an alleged claim under The Free Exercise Clause of the First Amendment argued in conjunction with a Fourteenth Amendment due process analysis is jurisdictionally defective. This is true with regard to Petitioners' instant Petition as it was in their prior attempt at review in Case No. 89-1881. Simply stated, there is no final decision to review.

In order for this Court to hear the Petitioners' constitutional claims, such arguments must be presented to the state court of last resort for a "final" decision. 28 U.S.C. § 1207(a). In this instance, petitioners failed to present any such claims or arguments to the Oklahoma Supreme Court following *McDonald* II (Resp. App., at 1-5). Thus, the Petition herein must be denied. *Webb v. Webb*, 451 U.S. 493, 495 (1981).

It should be noted that even the Oklahoma Court of Appeals did not rule upon such federal constitutional claims in *McDonald* II. Petitioners cannot, however, invoke discretionary review without presenting such arguments "to the last state court in which a decision of that question could be had." *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963). Under Rule 3.13, Oklahoma Rules on Practice

and Procedure in the Court of Appeals and on Certiorari to that Court, the Oklahoma Supreme Court is the court of last resort.

B. RES JUDICATA PRECLUDES REVIEW OF PETITIONERS' FIRST AMENDMENT CLAIM.

Respondents have referred to a prior decision by the Oklahoma Court of Appeals in the Statement of the Case. That Memorandum Opinion, referred to above as *McDonald* I, addressed petitioners' alleged First Amendment claim against the licensure requirement of the Act. *McDonald* I became final upon the subsequent dismissal of petitioners' appeal as untimely by the Oklahoma Supreme Court in 1990. (Pet. App., at 9). As previously noted, this Court denied review of *McDonald* I in *State of Oklahoma v. McDonald, et al.*, 498 U.S. 817 (1990).

The doctrine of *res judicata*, therefore, precludes reconsideration of petitioners' Free Exercise Clause claim against licensure in the instant petition. *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992). Although petitioners argued to the Court of Appeals in *McDonald* II that Section 402(4) is too vague in defining the "primarily educational" exemption from licensure, the claim is identical in both appeals in that petitioners alleged licensure violates their religious rights under the First Amendment.

Even if petitioners had presented such a claim to the Oklahoma Supreme Court following *McDonald* II, *res judicata* bars review by this Court under any circumstances. Petitioners failed to timely present that argument to the Oklahoma Supreme Court after the Oklahoma Court of Appeals decision in *McDonald* I and are bound by that

ruling. There is no jurisdiction to hear the claim, and review should be denied.

C. SECTION 402(4) OF THE ACT DOES NOT APPLY HERE

The Oklahoma Court of Appeals properly held that the "clear and unambiguous wording of Section 402(4)" does not exempt a full-time residential facility for children such as Calvary Christian Boarding Academy. The intermediate appellate court pointed out that such an interpretation was in full accord with the explicit purpose of the Act under Section 401(a) to:

> " . . . insure maintenance of minimum standards for the care and protection of children away from their homes . . . "

It is uncontroverted that minor children reside in Petitioners' facility twenty-four hours a day away from their homes and parents. Indeed, many are from out of state. They are cared for and supervised by unrelated adults. There is no dispute that petitioners operate a full-time facility as opposed to part-time.

Section 402(a) of the Act provides that "full time" care is:

> " . . . continuous care given to a child beyond a minimum of 24 hours."

There are no exemptions for full-time care. As the appellate court opined in *McDonald* II, Section 402(4) provides exemptions only for "part-time" care. Even if petitioners' facility could qualify as primarily educational in purpose,

it is not a parttime (less than 24 hours per day) operation. Although other exemptions exist for facilities that are licensed by other agencies, petitioners do not claim and are not entitled to such exemptions. *See* Section 403 (Pet. App., at 10).

The Court of Appeals was correct in *McDonald* II in analyzing Section 402(4) in conjunction with the Act's stated purpose of protecting children away from their homes. Obviously, states have a compelling interest in adopting *minimum* standards to protect the health and welfare of children residing full-time with unrelated adults away from their parents or guardians.

Even if one assumes that petitioners may present a Fourteenth Amendment due process argument, petitioners cannot qualify for the disputed exemption since they are not a "part-time" facility. Thus, the dictates of this Court concerning vagueness do not apply under these facts. Petitioners' reliance upon *Grayned v. City of Rockford*, 408 U.S. 104 (1972) is misplaced since petitioners do not qualify as a part-time facility.

Since neither the First Amendment, nor any other federal constitutional or statutory claims are involved, references to *Smith v. Goguen*, 415 U.S. 566 (1974) and *NAACP v. Button*, 371 U.S. 415 (1963) are similarly not applicable.

CONCLUSION

This Court should deny certiorari in this case based upon the foregoing arguments.

Respectfully submitted,

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APPENDIX 1

IN THE SUPREME COURT FOR THE STATE OF OKLAHOMA

CALVARY BAPTIST CHURCH and REVEREND JERRY MCDONALD,	)	
Petitioners,	)	No. 78,459
vs.	)	
OKLAHOMA DEPARTMENT OF HUMAN SERVICES and BENJAMIN DEMPS, JR., in his capacity as the Director of the Oklahoma Department of Human Services,	)	
Respondents.	)	

AMENDED PETITION FOR CERTIORARI TO THE OKLAHOMA SUPREME COURT

COME NOW Petitioners Calvary Baptist Church and Reverend Jerry McDonald, Petitioners in this case, and, pursuant to 20 O.S. 1971 § 30.1, and Rule 3.13, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, hereby respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals, Division III, State of Oklahoma, made in this proceeding on July 20, 1993.

The opinion has not been published in the Oklahoma Bar Association Journal. Therefore a copy of the court of Appeals' Memorandum Opinion in No. 78,459, *Calvary Baptist Church and Reverend Jerry McDonald v. Oklahoma Department of Human Services and Benjamin Demps*, is appended hereto. The date of the decision for which

Petitioners seek review is July 29, 1993. Denial of Petition for Rehearing was filed July 5, 1993.

REASONS FOR GRANTING WRIT

The Oklahoma Supreme Court has never decided whether a boarding school facility which is primarily educational is subject to the jurisdiction of the Department of Human Services.

STATEMENT OF FACTS

Petitioners seek review of decision of the Court of Appeals, Division III, which reversed a Trial Court Order granting judgment to them in the Church's declaratory judgment action, thereby finding the Church's boarding academy primarily educational in purpose and holding the Church exempt from DHS licensing requirements for child care facilities.

In 1987, Reverend Jerry McDonald and Calvary Baptist Church were enjoined from operating Calvary Boys Ranch, a child-care facility according tot he courts, until the Boys Ranch obtained a child care license from the Department of Human Services. After all reviews of this decision had been completed, the Church closed the Boys Ranch on December 22, 1990. On January 4, 1991, a new facility, this time a boarding school, Calvary Christian Boarding Academy, was opened.

The Trial Court found that " 'Calvary Christian Boarding Academy . . . is primarily educational as distinct from the Boys Ranch which was primarily rehabilitative.' " *Calvary Baptist Church v. Oklahoma Department of*

Human Services, No. 78,459, slip op. at 2. The Trial Curt also found that the wording in 10 O.S. §402(4), exempting facilities that are primarily educational from licensure, is " 'vague and [has] limited application but under the intent of the Statute and under the interpretation that has been given to the wording of the Statute by [DHS] for a long period of time, . . . a facility whose purpose is "primarily educational" is exempt from licensure.' "

The Trial Court then concluded that "where an institution is primarily education, the fact of incidental caring for, feeding and providing for minor children does not necessarily make it a child care facility" and that "the wording of Title 10 Section 402, with regard to facilities the purpose of which is primarily educational, recreational or for medical treatment creates an exemption from licensure by the Department of Human Services." Further, the Trial court held that

> the Statute fails to set up standards or definitions for the determination of what is an education facility; that this permits a basically child care facility to avoid licensure by the Department of Human Services, and to some extent avoid the supervision and scrutiny of public officials and to avoid meeting minimum requirements set by the State for the protection of children. The Court holds that there is a gap in the law which should be corrected but should not be corrected by a "Statute" written by a Trial Judge.

Therefore, it was the Order of the Trial Court that

> Calvary Christian Boarding Academy is not subject to the prior Injunctive Order of this Court; the Court declares that under the Child Care

> Facilities Licensing Act of the State of Oklahoma the Calvary Christian Boarding Academy is not required to obtain a license from the Department of Human Services before it can operate in this State.

The Department appealed that decision and the Court of Appeals reversed, holding that "primarily educational" exclusion of 10 O.S. § 402(2) was limited only to facilities providing "part-time" care, not "full-time" care facilities. Therefore, Calvary Christian Boarding Academy must be licensed by the Department, because, according to the Court of Appeals, the Boarding Academy offers "full-time care" as defined in the Act.

ARGUMENT

The only thing that is defined in the Act is "part-time" and "full-time." Not surprisingly, "part-time" means less than a full day, "full-time" means a full day. "Care" is not defined. May the facility be both a primarily educational institution *and* a primarily care-giving one? The law does not specifically address that question. Therefore, the Trial Court was not in error in concluding that there is a gap in that law.

The Church contends, and the trial court agreed, that it is providing primarily education to the students enrolled in the Boarding Academy, and is not primarily a caregiver. If you will, it is not a "full-time" care-giver. Neither is a hospital – primarily a medical treatment facility – which also incidentally provides care to children within its walls, a "full-time" care-giver. Neither should

be subject to the licensing requirements of the Department of Human Services.

The law gives no guidelines to direct the Department in determining whether the services being given by a facility is "care" or "education" under the terms of the Statute. There is a gap which may need to be filled. However, it is not the province of a court to write a statute to fill a gap left by the Legislature. It was error for the Court of Appeals to have done so.

ARGUMENT

The Court of Appeals was in error in filling the gap in the Child Care Facilities Licensing Act, taking on itself the role of the Legislature. While a gap may exist, it is not the province of the judicial system to fill it. This substantial question has never before been determined by the Supreme Court. Petitioners therefore respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Comes now the undersigned and hereby certifies that the foregoing Amended Petition for Certiorari to the Oklahoma Supreme Court has been served upon opposing counsel John G. Fears, Department of Human Services, P.O. Box 53025, Oklahoma City, Oklahoma 73152-3025, by placing a copy in the United States Express Mail, return receipt requested, on November 12th, 1993.

/s/ Fred P. Wendel